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CTI Group Inc v International Bulk Carriers SPA

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FEDERAL COURT (KOTA KINABALU) — CIVIL APPEAL NO 02(f)-61–09 OF 2015(S)
AHMAD MAAROP, ABU SAMAH NORDIN, ZAHARAH IBRAHIM, AZIAH ALI FCJJ AND ABDUL RAHMAN SEBLI JCA
10 AUGUST 2017

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Arbitration — Award — Enforcement — Order made for award to be binding and enforceable as judgment — Application to set aside order — Whether IBC party to share transfer agreement ('agreement') — Whether IBC merely subsidiary of one of parties to agreement — Whether annexures signed by IBC formed an integral part of agreement — Whether CTI complied with requirements under s 38 of the Arbitration Act 2005 ('the Act') — Whether arbitral award sought to be enforced valid — Whether application to set aside order could only be made upon grounds set out in s 39 of the Act — Arbitration Act 2005 ss 38 & 39

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CNAN Group SPA ('CNAN'), an Algerian company, entered into a share transfer agreement ('the agreement') with CTI Group INC ('CTI') and two others. Under the agreement, CNAN agreed to sell and transfer 51% of its shares in International Bulk Carriers SPA ('IBC') to CTI and two others ('the purchasers') for the sum of of USD9,282,000. The purchasers paid the sum of USD6,832,000 upon the signing of the agreement with the balance of USD2,450,000 to be paid in five instalments over a five-year period. It was also a term of the agreement that the purchasers would grant IBC a loan for USD5m. In order to safeguard the interest of the purchasers, the agreement contained a guarantee clause, which provided that the payment of the balance of the purchase price of USD2,450,000 would be guaranteed by the assignment to CNAN by the purchasers of part of their claim on the repayment of the loan of USD5m to IBC (annexure 6). The guarantee clause further provided that the guaranteed sum (the USD2,450,000) would be deposited into a bank account maintained in the name of IBC and that sum pledged as security in favour of CNAN (annexure 7). The agreement also provided that both annexures 6 and 7, which were signed by IBC, formed an integral part of the agreement. Pursuant to the agreement, IBC's vessels were chartered to CTI. When disputes arose between the parties, CTI referred the dispute to the ICC arbitral tribunal in accordance with the arbitration clause in the agreement. IBC objected to the jurisdiction of the arbitral tribunal over it because it claimed that it was not a party to the agreement. The arbitral tribunal dismissed the objection and made an award of USD7m, and interest ('the award') in favour of CTI. Subsequently, CTI filed an ex parte application to the High Court under s 38 of the Arbitration Act 2005 ('the Act') seeking an order for

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A the award to be binding and enforceable as a judgment. The High Court granted the order applied for ('the order'). IBC then applied to have the order set aside on the grounds that the requirements of s 38 of the Act had not been complied with. It was IBC's case that there was no arbitration agreement between the IBC and CTI and that IBC was merely a subsidiary of one of the B parties to the agreement, namely CNAN. In response CTI argued that IBC was a party to the agreement as it had signed annexures 6 and 7 to the agreement and these Annexures formed integral parts of the agreement. CTI further submitted that an application to set aside an order made under s 38 of the Act could only be made upon the grounds set out in s 39 of the Act as it was s 39 C that dealt with applications to set aside such an order, and not s 38, which had no provision for setting aside such an order. The trial judge found that the arbitration clause in the agreement was binding upon IBC as annexures 6 and 7 formed integral parts of the agreement. As such, the High Court judge D dismissed the setting aside application. IBC appealed to the Court of Appeal. The Court of Appeal found that CTI had not complied with the requirements under s 38 of the Act and that the registration of the award by CTI was a nullity that ought to be set aside as of right without any need for IBC to rely on the provisos stated in s 39 of the Act. Thus, the Court of Appeal allowed IBC's E appeal. CTI has since obtained leave to proceed with the present appeal. Before this court IBC submitted that s 38 of the Act provides that an arbitral award from a foreign state could only be accorded recognition and enforcement by the High Court if the duly authenticated award and arbitration agreement were produced before the High Court. IBC thus argued that since no such F arbitration agreement was produced before the High Court in this case, there was in fact no arbitration agreement between CTI and IBC. CTI maintained that IBC's objection that it was not a party to the arbitration agreement should be raised before the supervisory court, and not the enforcement court.

G **Held,** allowing the appeal with costs:

(1) In the present appeal, CTI sought to enforce an arbitral award. The discussion on the differences in the definitions of 'agreement in writing' in the various jurisdictions did not detract from the common position taken by all the cases referred to, which clearly provided that all the court H was required to do at the first stage of the enforcement proceeding was to satisfy itself that the party seeking enforcement had produced before the court the arbitral award sought to be enforced, which prima facie or apparently was a valid award; and that the arbitration agreement between the party seeking to enforce the award and the party against whom the I award was sought to be enforced was apparently a valid agreement. If the parties were named in the arbitration agreement, or if it was obvious on the face of the arbitration agreement that they were parties to the agreement, obviously the 'apparently valid' test or the 'prima facie' test would be satisfied and there was nothing more to be done and leave

should be granted. In the present appeal, it was not in dispute that at the first stage in the High Court, annexures 6 and 7 signed by IBC were not produced. The agreement itself was produced, and there was no dispute that it contained an arbitration agreement and was signed by the purchasers (including CTI) as well as the vendor, CNAN. It was clear from cll 1.1 and 1.2 of the agreement that the annexures constituted an integral part of the agreement and there was no argument that there was any conflict between the annexures and the agreement itself. In the circumstances, by producing the agreement at the ex parte stage before the High Court, CTI had discharged the burden imposed upon it by s 38(2) of the Act. The High Court judge had thus not erred when he granted the order for the award to be binding and enforceable as a judgment as the requirements of the first stage of the enforcement proceedings had been complied with (see paras 87–89, 94, 96–101 & 104).

(2) The two-stage process for the enforcement of arbitral awards as contained in ss 38 and 39 of the Act (read with O 69 r 8 of the Rules of Court 2012) did not permit a party seeking to set aside an order made under s 38 to apply to set it aside under that very section on the ground that there was no arbitration agreement in existence between the parties. That party must apply to set that order aside under s 39 of the Act. When the matter moved to the second stage under s 39, IBC could only apply to set aside the order made under s 38 upon any one or more of the grounds set out in s 39 and no other. In the present appeal, IBC's setting aside application was not made on any of the substantive grounds in s 39 of the Act. It was made under s 38 of the Act solely on the ground that the agreement produced by CTI was not an arbitration agreement between the CTI and IBC and therefore the threshold requirement had not been satisfied. The High Court judge was therefore correct in dismissing IBC's application to set aside the order (see paras 105–108).

[Bahasa Malaysia summary

CNAN Group SPA ('CNAN'), sebuah syarikat Algeria, telah membuat suatu perjanjian pemindahan syer ('perjanjian itu') dengan CTI Group INC ('CTI') dan dua yang lain. Menurut perjanjian itu, CNAN bersetuju untuk menjual dan memindahkan 51% syer miliknya dalam International Bulk Carrier SPA ('IBC') kepada CTI dan dua yang lain ('pembeli') dengan harga USD9,282,000. Pembeli telah membayar sejumlah USD6,382,000 apabila perjanjian itu ditandatangani dengan baki sebanyak USD22,450,000 dibayar secara lima kali ansuran dalam tempoh lima tahun. Turut menjadi terma perjanjian itu bahawa pembeli akan memberikan IBC pinjaman berjumlah USD5 juta. Bagi melindungi kepentingan pembeli, perjanjian itu mengandungi klausa jaminan, yang memperuntukkan bahawa bayaran baki harga jualan sebanyak USD2,450,000 itu akan diberi jaminan melalui

penyerahhakan kepada CNAN sebahagian daripada tuntutan pembayaran semula bagi pinjaman berjumlah USD5 juta oleh pembeli kepada IBC (lampiran 6). Klausa jaminan itu selanjutnya memperuntukkan bahawa jumlah yang dijamin (USD2,450,000) akan didepositkan ke suatu akaun bank atas nama IBC dan jumlah wang itu dijadikan sebagai sekuriti bagi pihak CNAN (lampiran 7). Perjanjian itu juga memperuntukkan bahawa kedua-dua lampiran 6 dan 7, yang ditandatangani oleh IBC, menjadi suatu bahagian penting dalam perjanjian itu. Menurut perjanjian itu, vesel milik IBC disewakan kepada CTI. Apabila pertelingkahan timbul antara pihak-pihak, pihak CTI telah merujuk pertelingkahan itu kepada tribunal pengguna ICC sebagaimana menurut klausa timbang tara dalam perjanjian itu. IBC membantah bidang kuasa tribunal timbang tara ke atas IBC kerana IBC menyatakan bahawa mereka bukanlah pihak dalam perjanjian itu. Tribunal timbang tara menolak bantahan itu dan membuat suatu award berjumlah USD7 juta, dan kepentingan ('anugerah') yang memihak kepada CTI. Selanjutnya, pihak CTI telah memfailkan suatu permohonan ex parte kepada Mahkamah Tinggi di bawah s 38 Akta Timbang Tara 2005 ('Akta') yang memohon perintah bagi award yang diberikan mengikat dan boleh dikuatkuasakan sebagai suatu penghakiman. Mahkamah Tinggi membenarkan permohonan yang diminta ('perintah'). Pihak IBC kemudiannya telah datang memohon supaya perintah yang diberikan diketepikan atas alasan bahawa kehendak di bawah s 38 Akta telah tidak diketahui. Pihak IBC menyatakan bahawa tiada perjanjian timbang tara dibuat antara pihak IBC dan CTI dan bahawa IBC hanyalah merupakan subsidiari kepada salah satu pihak kepada perjanjian itu, iaitu CNAN. Dalam hujahan balasnya, pihak CTI menghujahkan bahawa pihak IBC merupakan salah satu pihak kepada perjanjian itu kerana ia telah menandatangani lampiran 6 dan 7 kepada perjanjian itu dan lampiran-lampiran ini menjadi bahagian penting dalam perjanjian itu. Pihak CTI selanjutnya menghujahkan bahawa suatu permohonan untuk mengenepikan suatu perintah yang dibuat di bawah s 38 Akta hanya boleh dibuat atas alasan yang digariskan dalam s 39 Akta kerana s 39 yang berkenaan dengan permohonan untuk mengenepikan suatu perintah seperti itu, dan bukan s 38, yang tidak mempunyai peruntukan untuk mengenepikan suatu perintah seperti itu. Hakim bicara mendapati bahawa klausa timbang tara dalam perjanjian itu adalah mengikat IBC kerana lampiran 6 dan 7 menjadi suatu bahagian yang penting dalam perjanjian itu. Oleh yang demikian, hakim Mahkamah Tinggi telah menolak permohonan mengenepikan perintah itu. Pihak IBC telah membuat rayuan ke Mahkamah Rayuan. Mahkamah Rayuan mendapati bahawa pihak CTI telah tidak mematuhi kehendak di bawah s 38 Akta dan pendaftaran award oleh CTI merupakan suatu yang tidak sah yang sepatutnya diketepikan secara terus tanpa perlu untuk pihak IBC bergantung kepada proviso yang dinyatakan dalam s 39 Akta. Maka, Mahkamah Rayuan telah membenarkan rayuan oleh IBC. Pihak CTI kemudiannya telah mendapatkan izin untuk meneruskan rayuan ini. Di hadapan mahkamah ini, pihak IBC menghujahkan bahawa s 38

Akta memperuntukkan bahawa suatu award timbang tara daripada sebuah negara asing hanya boleh diberi pengiktirafan dan penguatkuasaan oleh Mahkamah Tinggi sekiranya award yang disahkan dengan sewajarnya dan perjanjian timbang tara itu dikemukakan kepada Mahkamah Tinggi. Pihak IBC kemudiannya berhujah memandangkan tiada perjanjian timbang tara sebegitu dikemukakan kepada Mahkamah Tinggi dalam kes ini, maka sebenarnya tiada perjanjian timbang tara pun yang wujud antara pihak CTI dan IBC. Pihak CTI turut menghujahkan bahawa bantahan IBC bahawa ia bukanlah merupakan suatu pihak dalam perjanjian timbang tara itu sepatutnya dibangkitkan di hadapan mahkamah yang memantau, dan bukan mahkamah yang menguatkuasakan.

Diputuskan, membenarkan rayuan dengan kos:

(1) Dalam rayuan ini, pihak CTI memohon untuk menguatkuasakan suatu award timbang tara. Perbincangan tentang perbezaan dalam tafsiran 'perjanjian bertulis' dalam bidang kuasa yang pelbagai tidak lari daripada kedudukan umum yang diambil oleh semua kes yang dirujuk, yang dengan jelas memperuntukkan bahawa semua mahkamah hendaklah, di peringkat pertama prosiding penguatkuasaan, memuaskan hatinya bahawa pihak yang memohon penguatkuasaan itu hendaklah mengemukakan kepada mahkamah award timbang tara yang hendak dikuatkuasakan itu, yang secara prima facie atau zahirnya merupakan suatu award yang sah; dan perjanjian timbang tara antara pihak-pihak yang hendak menguatkuasakan award dan pihak yang terhadapnya hendak dikuatkuasakan secara zahirnya suatu perjanjian yang sah. Sekiranya pihak-pihak dinamakan dalam perjanjian timbang tara, atau sekiranya adalah sangat jelas dalam perjanjian timbang tara itu bahawa mereka merupakan pihak-pihak kepada perjanjian, maka jelaslah bahawa ujian 'zahirnya sah' atau ujian 'prima facie' telah dipenuhi dan tidak ada apa-apa perkara lain yang perlu dibuat dan izin hendaklah diberikan. Dalam rayuan ini, tidak dinafikan bahawa pada peringkat pertama di Mahkamah Tinggi, lampiran 6 dan 7 yang ditandatangani oleh IBC tidak dikemukakan. Perjanjian itu kemudiannya dikemukakan, dan tidak disangkal bahawa perjanjian itu mengandungi suatu perjanjian timbang tara yang ditandatangani oleh pembeli (termasuk CTI) dan juga penjual, CNAN. Adalah jelas daripda klausa 1.1 dan 1.2 perjanjian itu bahawa lampiran merupakan suatu bahagian yang penting dalam perjanjian itu dan tidak terdapat pertelingkahan bahawa terdapat konflik antara lampiran dan perjanjian itu sendiri. Dalam hal keadaan sedemikian, dengan mengemukakan perjanjian itu di peringkat ex parte kepada Mahkamah Tinggi, pihak CTI telah melepaskan beban yang diletakkan kepadanya melalui s 38(2) Akta. Oleh yang demikian, hakim Mahkamah Tinggi tidak terkhilaf apabila beliau membenarkan perintah supaya award itu mengikat dan boleh dikuatkuasakan sebagai suatu

penghakiman kerana kehendak peringkat pertama prosiding penguatkuasaan telah dipenuhi (lihat perenggan 87–89, 94, 96–101 & 104).

(2) Dua peringkat proses bagi penguatkuasaan award timbang tara sebagaimana yang terkandung dalam ss 38 dan 39 Akta (dibaca bersama A 69 k 8 Kaedah-Kaedah Mahkamah 2012) tidak membenarkan suatu pihak yang memohon untuk mengenepikan suatu perintah yang dibuat di bawah s 38 untuk memohon untuk mengenepikan perintah itu di bawah seksyen yang sama atas alasan tidak terdapat perjanjian timbang tara yang wujud antara pihak-pihak. Pihak itu hendaklah memohon untuk mengenepikan perintah di bawah s 39 Akta. Apabila hal perkara ini berpindah ke peringkat kedua di bawah s 39, pihak IBC hanya boleh memohon untuk mengenepikan perintah yang dibuat di bawah s 38 atas mana-mana satu atau lebih alasan yang digariskan dalam s 39 dan bukan yang lain. Dalam rayuan ini, permohonan untuk mengenepikan perintah oleh IBC tidak dibuat atas mana-mana alasan substantif dalam s 39 Akta. Ia dibuat menurut s 38 Akta semata-mata atas alasan bahawa perjanjian yang dikemukakan oleh pihak CTI bukanlah suatu perjanjian timbang tara antara CTI dan IBC dan oleh itu kehendak yang asas telah tidak dipenuhi. Hakim Mahkamah Tinggi adalah betul apabila menolak permohonan oleh IBC untuk mengenepikan perintah itu (lihat perenggan 105–108).]

Notes

For cases on enforcement, see 1(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1921–1938.

Cases referred to

Ajwa for Food Industries Co (MIGOP), Egypt v Pacific Inter-Link Sdn Bhd [2013] 5 MLJ 625, FC (refd)

Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd and another [2006] 3 SLR 174, HC (refd)

CE International Resources Holdings LLC v Yeap [2013] BCJ No 2158; 2013 BCSC 1804, SC (refd)

Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan [2011] 1 AC 763; [2009] EWCA Civ 755; [2010] UKSC 46, FC (refd)

Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd [2012] FCA 696, FC (refd)

Dardana Ltd v Yukos Oil Company [2002] 1 All ER (Comm) 819; [2002] EWCA Civ 543, CA (refd)

Denmark Skibstekniske Konsulenter A/S I Likvidation (formerly known as Knud E Hansen A/S) v Ultrapolis 3000 Investments Ltd (formerly known as Ultrapolis 3000 Theme Park Investments Ltd) [2010] 3 SLR 661, HC (refd)

IMC Aviation Solutions Pty Ltd v Altain Khuder LLC [2011] VSCA 248; [2011] 38 VR 303, SC (consd)
Lombard-Knight and another v Rainstorm Pictures Inc [2014] All ER (D) 28 (Apr); [2014] EWCA Civ 356, CA (refd)
Medison Co Ltd v Victor (Far East) Ltd [2000] 2 HKC 502, HC (refd)
PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal [2014] 1 SLR 372, CA (refd)
Rosseel NV v Oriental Commercial & Shipping Co (UK) Ltd [1991] 2 Lloyd's Rep 625 (refd)

Legislation referred to

Arbitration Act 1996 [UK] ss 5, 6, 100, 102, 102(1)(b), 103
Arbitration Act 2005 ss 8, 9, 9(4), 38, 38(2), (2)(a), (2)(b), 39
International Arbitration Act 1974 [AUS] ss 3, 3(1), (4), (5), 9
Rules of Court 2012 O 69 rr 8, 8(4), (7), (7)(a), 9

Appeal from: Civil Appeal No S-02–2990–12 of 2013 (Court of Appeal, Putrajaya)

Oommen Koshy (Premman Gopal, Foo Siew Li and Lee Mei Hooi with her) (Skrine) for the appellant.
Arun Kasi (M Rubini with him) (Christopher & Lee Ong) for the respondent.

Zaharah Ibrahim FCJ (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the appellant (who was the plaintiff in the High Court) against the decision of the Court of Appeal which allowed the appeal by the respondent (who was the defendant in the High Court) against the decision of the High Court dismissing the respondent's application to set aside the recognition and enforcement order made on 16 July 2013 in respect of a final award obtained by the appellant.

[2] In this judgment, the parties will be referred to as they were in the High Court.

BACKGROUND FACTS

[3] On 27 September 2007, an Algerian company called CNAN Group SPA ('CNAN') entered into a share transfer agreement ('STA') with the plaintiff and two others, namely, Pharaon Commercial Investment Group Limited ('Pharaon') and one Mr Mustapha Abdelwahab Laradji ('Laradji').

A **[4]** Under the STA, CNAN would sell and transfer 51% of its shares in the defendant to the plaintiff, Pharaon and Laradji ('purchasers'). 24.5% of the shares would be sold to the plaintiff, 24.5% to Pharaon and 2% to Laradji. The defendant was not a party to the STA. However, all of the shares in the defendant were held by CNAN.

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[5] The consideration for the sale and transfer of the shares was the sum of USD9,282,000 of which USD6,832,000 was paid by the purchasers upon the signing of the STA. The balance of USD2,450,000 was to be paid in five instalments over a five-year period.

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[6] Under the STA, the purchasers agreed to give a loan of USD5m to the defendant.

D **[7]** Clause 3.3 of the STA ('guarantee clause') provided that the payment of the balance of the purchase price would be guaranteed by the assignment to CNAN by the purchasers of part of their claim on the repayment of the loan of USD5m to the defendant. The assignment was limited to the amount of the balance of the purchase price for the sale and transfer of the shares under the

E STA. Annexure 6 to the STA referred to that guarantee and assignment. Annexure 6 was signed by the defendant.

[8] The guarantee clause further provided that the guaranteed sum of USD2,450,000 would be deposited into a bank account maintained in the

F name of the defendant. That sum was pledged as security in favour of CNAN. The pledge was referred to in annexure 7 to the STA. Annexure 7 was also signed by the defendant.

G **[9]** Clause 1.2 of the STA provided that the 'appendices' ('annexures') to the STA constituted an integral part of the STA. However, in cases of conflict between the agreement proper and the annexures, the agreement proper would take precedence.

H **[10]** The STA contained cl 11.4 ('arbitration clause') that provided for the referral of any dispute between the parties to arbitration in accordance with the Rules of the International Chamber of Commerce ('ICC').

I **[11]** After and pursuant to the STA, the defendant's vessels were chartered to the plaintiff.

[12] Disputes arose between the parties.

[13] Pursuant to the arbitration clause, the plaintiff and Pharaon instituted proceedings before an ICC arbitral tribunal ('arbitral tribunal') against CNAN, Laradji and the defendant. The defendant objected to the jurisdiction of the arbitral tribunal over it as it maintained that it was not a party to the STA. The arbitral tribunal dismissed the objection.

[14] The arbitral tribunal then made an award of USD7m, and interest, against the defendant, in favour of the plaintiff and Pharaon ('ICC arbitral award').

[15] The plaintiff subsequently filed an ex parte application before the High Court at Labuan under s 38 of the Arbitration Act 2005 ('our Arbitration Act') for an order recognising the ICC arbitral award as binding and enforceable as a judgment in terms of the award or by action.

[16] On 16 July 2013 the High Court granted the order applied for ('16 July 2013 order').

[17] The defendant subsequently applied to have the 16 July 2013 order set aside on the ground that the requirements of s 38 of our Arbitration Act had not been complied with ('setting aside application'). This is the application which led to the appeal before us.

IN THE HIGH COURT

[18] It was not in dispute that annexures 6 and 7 to the STA were not produced when the plainttiff made its ex parte application for recognition and enforcement of the ICC arbitral award. It was only produced during the setting aside application.

The plaintiff's submissions

[19] The plaintiff argued before the High Court that the defendant was a party to the STA as the defendant had signed annexures 6 and 7 to the STA and the annexures formed integral parts of the STA. The defendant had also taken an active part in all the stages of the STA and the STA created rights and obligations in relation to the defendant.

[20] In any case, argued the plaintiff, both parties had been accorded every opportunity before the arbitral tribunal to ventilate the very same arguments as to whether the defendant was a party to the STA when the defendant raised the issue of the tribunal's jurisdiction over it, and the arbitral tribunal had ruled

A that it had jurisdiction. According to the plaintiff, when the defendant submitted its counterclaims, the defendant had unconditionally recognised the jurisdiction of the arbitral tribunal.

B **[21]** The plaintiff further argued that an application to set aside an order made under s 38 of our Arbitration Act could only be made upon the grounds set out in s 39 of that Act as it was s 39 that dealt with applications to set aside such an order, not s 38 which had no provision for setting aside such an order.

C *The defendant's submissions*

[22] The defendant submitted that there was no arbitration agreement between the defendant and the plaintiff. The defendant was merely a subsidiary of one of the parties to the STA.

D **[23]** The defendant submitted that annexures 6 and 7 were distinct documents of their own and there was no arbitration clause incorporated in them, nor was there any reference in them to the arbitration clause in the STA proper.

E **[24]** The defendant further submitted that annexures 6 and 7 were not produced when the plaintiff made its ex parte application. The counterclaim by the defendant before the arbitral tribunal was also not produced by the plaintiff when it made the application. Therefore, argued the defendant, no arbitration
F agreement as between the defendant and the plaintiff was before the court.

[25] The defendant argued that its setting aside application was properly made under s 38 as the 16 July 2013 order was void ab initio since such an order could only be made if there was before the court an arbitration agreement as
G defined under s 9 of our Arbitration Act.

The High Court's decision

[26] The High Court dismissed the setting aside application. The learned
H judge held that the arbitration clause in the sta was binding upon the defendant as annexures 6 and 7 formed integral parts of the STA. The learned judge found that it was irrelevant that the plaintiff did not produce annexures 6 and 7 when it applied for leave to enforce the ICC arbitral award as the relevant arbitration agreement was contained in the STA.

I **[27]** The learned judge also found that the defendant did not produce any material to show that the arbitral tribunal had erred in coming to the conclusion that under arbitration case law, international legal theory and applicable French law (which was the law of the seat of the arbitration) the

extension of an arbitration agreement to a non-signatory was acceptable if the agreement containing it created rights and obligations with regard to that party. In this case, the arbitral tribunal found that the defendant benefited from certain rights and assumed certain obligations deriving from the STA.

[28] The learned judge noted that the setting aside application was not made under s 39 of the Arbitration Act. The learned judge held that once the court satisfied itself that the arbitral award and arbitration agreement had been produced, and granted the recognition and enforcement order, it was for the defendant to 'request' the court under s 39 to refuse recognition. In this case, not only was the application not made under s 39, the court noted that 'counsel for the defendant pointedly submitted that this application is not made under section 39 but under section 38'. The learned judge therefore felt 'constrained to hold that the instant application must be dismissed for not complying with section 39'.

[29] Those were the principal grounds upon which the setting aside application was dismissed.

[30] The defendant appealed to the Court of Appeal.

IN THE COURT OF APPEAL

Grounds of appeal

[31] In the Court of Appeal, five grounds were advanced as the grounds for the defendant's appeal. They are summarised as follows:

(a) the learned judge erred in law and fact in taking the view that disputes arose between the plaintiff and the defendant from the STA to which the defendant was not a party;

(b) whether the arbitration clause in the STA was incorporated, by reference, into annexures 6 and 7;

(c) whether the defendant was a party to the STA by virtue of French law;

(d) whether the plaintiff could singularly enforce the arbitral award when the award was made in favour of the plaintiff *and* Pharaon;

(e) whether an order made under s 38 could be challenged on grounds of non-compliance with the requirements in that section.

Questions by Court of Appeal for further submissions

[32] The Court of Appeal, after hearing submissions by parties, directed that further submissions be filed in respect of two questions. According to the further submissions by the plaintiff, the further questions were:

(a) whether the production of the STA without its annexures met with the requirements of s 38 of our Arbitration Act; and

(b) if the matter did not fall within any of the specific grounds in s 39 of our Arbitration Act, whether failure to comply with s 38 was itself sufficient ground for setting aside.

[33] However, according to the defendant's further submissions before the Court of Appeal, the two questions were as follows:

(a) whether a defendant may challenge an ex parte order made under s 38 of the Arbitration Act to enforce an arbitral award on the ground that the plaintiff did not comply with the requirements in s 38, as opposed to challenging the enforcement order under s 39; and

(b) whether any document introduced by the plaintiff subsequent to its ex parte application may be considered by the court as part of the application.

[34] On the question posed by the Court of Appeal as to whether the ex parte application by the plaintiff had complied with the requirement under s 38 that the arbitration agreement be produced, the plaintiff submitted that while the signatories to the STA proper did not include the defendant, the defendant was a signatory to annexures 6 and 7 and those annexures were an integral part of the STA according to the STA. Therefore the plaintiff had, by producing the STA albeit without the annexures when it applied for the ex parte order, produced the arbitration agreement within the meaning of that term as defined in s 9 of our Arbitration Act.

[35] On the question of whether an application to set aside an enforcement order could be made under s 38, instead of s 39, of our Arbitration Act, the plaintiff submitted that the recognition and enforcement process of an arbitral award under our Arbitration Act was a two-stage process. The court would not have made the order pursuant to an ex parte application under s 38 unless it was satisfied that the provisions of s 38 had been complied with. That order could only be set aside in the second stage, which must be done under s 39.

[36] The defendant submitted that the plaintiff only produced annexures 6 and 7 when objection was taken by the defendant that it was not a party to the

STA. The defendant submitted that both documents did not have any arbitration clause nor any clause incorporating an arbitration clause from any other document.

[37] The defendant submitted that it was only when the plaintiff had produced both the arbitral award and the arbitration agreement as required by sub-s 38(2) in an application for enforcement under s 38 that the burden would shift to the defendant to raise and prove any of the grounds under s 39. If that requirement was not satisfied even at the inter partes hearing, then the plaintiff was not entitled to the enforcement order and the question of the defendant having to prove any ground under s 39 did not arise.

[38] The defendant submitted that the question was not whether the STA incorporated the annexures but whether the annexures incorporated the arbitration clause in the STA, There was no such incorporation clause in the annexures.

Decision of the Court of Appeal

[39] The Court of Appeal held that the 'central issues before us are: (i) whether the registration of the award was valid when the annexure to the arbitration was not produced before the court for purpose of registration of the award under section 38 of the Act; and (ii) whether an award can be registered when the defendant's name does not appear in the arbitration agreement, pursuant to section 38 to be read with section 9 of the Arbitration Act'.

[40] The Court of Appeal then allowed the defendant's appeal on the grounds as set out in para 8 of the Court of Appeal's judgment, the exact words of which we reproduce below:

> [8] We have read the appeal record and the submissions of the parties in detail. We take the view the appeal should be allowed. Our reasons, inter alia, are as below:
>
> (a) we have gone through the meticulous as well as commendable judgment of the learned judge and authorities relied for coming to the reasoned judgment. We are of the considered view that the authorities do not deal with the issues faced in the instant case;
>
> (b) it is trite the parties relying on the provision of the AA 2005 must strictly comply with the provisions of the Act and more so when they are given exclusive privilege and benefit to register a foreign award which can only be challenged in a limited circumstances as set out in s 39. The doors for registration cannot be widely opened by judicial fiat more so when it is not provided for by Parliament (see *Taman Bandar Baru Masai Sdn Bhd v Dindings Corporations Sdn Bhd* [2009] MLJU 0793; [2010] 5 CLJ 83);

(c) the plaintiff's argument that the setting aside the award can only take place pursuant to s 39 of the Act does not have merit when there are flaws in the registration of the award under s 38, more so when the mandatory requirement of s 38 is not complied with on the face of the record. In consequence, an award registered under s 38 can be set aside as of right if the conditions stated in the section is not satisfied and there is no obligation to make an application under s 39 to set aside an award even though the applicant can satisfy one of the criteria in the said section. In addition, the law does not prohibit an application to be made both under s 38 as well as s 39; and

(d) the registration of the award on facts of the instant case is ab initio a nullity and ought to be set aside as of right without any need for the defendant to rely on the provisos stated in s 39 (see *Badiaddin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393).

IN THE FEDERAL COURT

Leave questions

[41] The Federal Court on 20 August 2015 granted leave to the plaintiff to appeal on the following questions of law:

(i) where an arbitral tribunal applying the substantive law of the contract and/or the law of the seat of arbitration (neither of which is Malaysian law) holds that a non-signatory to an arbitration agreement is a party to the arbitration agreement, can the Malaysian court pursuant to s 38 of the Arbitration Act 2005 hold otherwise? and

(ii) whether after the court has granted the order for recognition and enforcement of an arbitration award pursuant to s 38 of the Arbitration Act 2005, can recognition and enforcement be refused on grounds other than as provided for in s 39 of the Arbitration Act 2005.

APPEAL

Submissions

Leave question (i)

The plaintiff's submissions

[42] The plaintiff submitted before us that in all other jurisdictions, except in the case of *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011] VSCA 248; [2011] 38 VR 303 ('Altain'), the consistent approach to the recognition of arbitral awards is that it is a two-stage process. In the first stage, if the formal requirements appear to have been met, but subject to the court's power in the second stage, recognition and enforcement are mandatory. A

challenge to the recognition and enforcement on the ground that there is no arbitration agreement between the parties must be dealt with in the second stage. In the second stage, the plaintiff submitted, the grounds for refusal to accord recognition and enforcement are exhaustive. In the Malaysian context, the first stage is that stage as is provided for in s 38 of our Arbitration Act, and the second stage is as is provided for in s 39 of the Act.

[43] In support of its contention, the plaintiff referred us to the following cases:

(a) *Rosseel NV v Oriental Commercial & Shipping Co (UK) Ltd* [1991] 2 Lloyd's Rep 625 (QBD);

(b) *Dardana Ltd v Yukos Oil Company* [2002] 1 All ER (Comm) 819; [2002] EWCA Civ 543 (CA) ('Dardana');

(c) *Lombard-Knight and another v Rainstorm Pictures Inc* [2014] All ER (D) 28 (Apr); [2014] EWCA Civ 356('Lombard-Knight');

(d) *Medison Co Ltd v Victor (Far East) Ltd* [2000] 2 HKC 502;

(e) *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372 ('Astro');

(f) *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd and another* [2006] 3 SLR 174 ('Aloe Vera');

(g) *Denmark Skibstekniske Konsulenter A/S I Likvidation (formerly known as Knud E Hansen A/S) v Ultrapolis 3000 Investments Ltd (formerly known as Ultrapolis 3000 Theme Park Investments Ltd)* [2010] 3 SLR 661 (*Ultrapolis 3000*); and

(h) *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd* [2012] FCA 696.

The defendant's submissions

[44] The defendant submitted that s 38 of our Arbitration Act provides that the recognition and enforcement of an arbitral award from a foreign state by the High Court is subject to both s 38 itself as well as s 39. That recognition and enforcement can only be accorded under s 38 if the duly authenticated award and arbitration agreement are produced before the High Court.

[45] In this case, it is the defendant's case that there was no arbitration agreement produced before the High Court as there is in fact no arbitration agreement between the plaintiff and the defendant.

[46] The defendant also submitted that neither the Algerian law (being the law applicable to the STA) nor the French law (being the law of the seat of arbitration as stipulated in the STA) was produced before the High Court. As such the plaintiff had failed to discharge its burden of proving that the defendant was a party to the STA under Algerian or French law.

[47] Relying on the case of *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763; [2009] EWCA Civ 755; [2010] UKSC 46 ('Dallah'), the defendant argued that the arbitral tribunal's decision that the defendant is a party to the arbitration agreement does not bind the defendant as the defendant did not submit the question of 'arbitrability' to the tribunal.

[48] The defendant relied extensively on *Altain* in their argument that until the threshold requirement of the production of an arbitration agreement is satisfied, there is no burden on the defendant under s 39 of our Arbitration Act to set aside the 16 July 2013 order.

[49] It was also the defendant's contention that the 16 July 2013 order was not 'in terms' of the award as the arbitral award required the defendant to pay the plaintiff and Pharaon the amount ordered to be paid under the award. However, the ex parte order was obtained by the plaintiff alone and there was no evidence that Pharaon had authorised the plaintiff to collect any payment on its behalf (we note however, that this issue was not in any of the grounds of appeal in the plaintiffs memorandum of appeal, nor was this issue discussed by the Court of Appeal).

Leave Question (ii)

The plaintiff's submissions

[50] The plaintiff submitted that the defendant's objection that it is not a party to the arbitration agreement must be raised before the supervisory court, not the enforcement court. The law applicable in relation to that issue is the law of the underlying contract and/or the law of the seat of arbitration, not the law of the enforcement court. The plaintiff relied on the same cases as for leave question (i) as well as *Dallah*, and *CE International Resources Holdings LLC v Yeap* [2013] BCJ No 2158; 2013 BCSC 1804.

[51] The plaintiff also submitted that the Court of Appeal in France (the supervisory court) had in fact dismissed the defendant's objection that it is not a party to the STA.

The defendant's submissions

[52] The defendant responded in submission that the 16 July 2013 order is an interim order with a right conferred under O 69 r 8(7)(a) of the Rules of Court 2012 to the defendant to have it set aside within 14 days of service. If at the inter partes hearing the plaintiff was unable to show that it had satisfied the threshold requirement of s 38 of our Arbitration Act, the ex parte order must be set aside. A challenge on any of the grounds in s 39 does not arise.

[53] The defendant further submitted that the Court of Appeal of Victoria, Australia, in *Altain* did not follow *Dardana* due to the difference in the definition of 'arbitration agreement' in the United Kingdom's Arbitration Act 1996 ('the UK Act') as compared to Australia's International Arbitration Act 1974 ('Australia Act'). The definition of that term in our Arbitration Act, according the defendant, is similar to the definition in the Australian Act.

ANALYSIS

[54] Having read the record of appeal and read and heard the submissions by both parties before us, we conclude that this appeal essentially revolves around the narrow issues of:

(a) what must the court be satisfied of at the first stage before it can grant an order giving permission to enforce an arbitral award; and

(b) whether that order can be set aside purely on the basis that that order should not have been made in the first place.

[55] Before proceeding further, we need to state that the issues before this court and the courts below relate only to the *arbitration agreement* which is required to be produced by the plaintiff at the first stage before the High Court. The defendant did not dispute that a valid arbitral award *was* produced in the High Court in compliance with para s 38(2)(a) of our Arbitration Act.

Statutory provisions

[56] The provisions on recognition and enforcement of arbitral awards as contained in articles 35 and 36 of the UNCITRAL Model Law on International Commercial Arbitration ('the Model Law') have been incorporated into ss 38 and 39 of our Arbitration Act.

[57] Articles 35 and 36 of the Model Law are derived from articles IV and V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ('the Convention').

[58] Article 35 of the Model Law (before the amendment in 2006) was as follows:

Article 35 Recognition and enforcement

(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.

(2) The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the award or agreement is not made in the official language of this State, the party shall supply a duly certified translation thereof into such language.

[59] Article 36 of the Model Law reads as follows:

Article 36 Grounds for refusing recognition or enforcement

(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted for arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, the award was made; or

(b) if the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

(c) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v) of this article, the court, where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

[60] The provisions of ss 38 and 39 of our Arbitration Act are as follows:

38 Recognition and enforcement

(1) On an application in writing to the High Court, an award made in respect of an arbitration where the seat of arbitration is in Malaysia or an award from a foreign State shall, subject to this section and section 39 be recognized as binding and be enforced by entry as a judgment in terms of the award or by action.

(2) In an application under subsection (1) the applicant shall produce —

(a) the duly authenticated original award or a duly certified copy of the award; and

(b) the original arbitration agreement or a duly certified copy of the agreement.

(3) Where the award or arbitration agreement is in a language other than the national language or the English language, the applicant shall supply a duly certified translation of the award or agreement in the English language.

(4) For the purposes of this Act, 'foreign State' means a State which is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration in 1958.

39 Grounds for refusing recognition or enforcement

(1) Recognition or enforcement of an award, irrespective of the State in which it was made, may be refused only at the request of the party against whom it is invoked —

(a) where that party provides to the High Court proof that —

(i) a party to the arbitration agreement was under any incapacity;

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of the State where the award was made;

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;

(iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;

(v) subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration;

(vi) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act; or

(vii) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the High Court finds that —

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or

(ii) the award is in conflict with the public policy of Malaysia.

(2) If an application for setting aside or suspension of an award has been made to the High Court on the grounds referred to in subparagraph (1)(a)(vii), the High Court may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

(3) Where the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced.

[61] Paragraph (2) of article 35 of the Model Law was amended in 2006. With the amendment only the arbitral award or a copy of the award needs to be produced. There is no longer any requirement to produce the arbitration agreement. However, s 38 of our Arbitration Act has not been amended to follow suit. Paragraph 35(2) of the Model Law now reads as follows:

(2) The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a translation thereof into such language.

[62] The term 'arbitration agreement' is defined in s 9 of our Arbitration Act. Section 9 reads as follows:

9 Definition and form of arbitration agreement

(1) In this Act, 'arbitration agreement' means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in an agreement or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing where it is contained in —

(a) a document signed by the parties;

(b) an exchange of letters, telex, facsimile or other means of communication which provide a record of the agreement; or

(c) an exchange of statement of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

(5) A reference in an agreement to a document containing an arbitration clause shall constitute an arbitration agreement, provided that the agreement is in writing and the reference is such as to make that clause part of the agreement.

[63] The procedure for obtaining recognition and enforcement is not provided for in the Model Law. Explanatory note 49 (before the 2006 amendment) by the UNCITRAL secretariat on the Model Law stated that:

49. The Model Law does not lay down procedural details of recognition and enforcement since there is no practical need for unifying them, and since they form an intrinsic part of the national procedural law and practice. The Model Law merely sets certain conditions for obtaining enforcement: application in writing, accompanied by the award and the arbitration agreement (article 35(2)).

[64] The procedure for the purpose of recognition and enforcement of an arbitral award in Malaysia is contained in O 69 rr 8 and 9 of the Rules of Court 2012. Rules 8 and 9 provide as follows:

8 Enforcement of awards (O 69 r 8)

(1) An application for permission to enforce an award in the same manner as a judgment or an order may be made without notice in an arbitration claim originating summons.

(2) The arbitration claim originating summons shall —

(a) state the name and the usual or last known place of abode or business of the applicant, and the respondent against whom it is sought to enforce the award, respectively; and

(b) state either that the award has not been complied with or the extent to which it has not been complied with at the date of the application.

(3) The applicant shall file by affidavit, written evidence on which he intends to rely when he files his originating summons, including exhibiting the original arbitration agreement and the duly authenticated original award or, in either case, a duly certified copy thereof and where the award or agreement is in a language other than the national language or English, a translation of it in the English language, duly certified as a correct translation by a sworn translator or by an official or by a diplomatic or consular agent of the country in which the award was made.

(4) The Court may specify parties to the arbitration on whom the arbitration claim originating summons shall be served.

(5) With the permission of the Court, the arbitration claim originating summons may be served out of the jurisdiction irrespective of where the award is, or is treated as, made.

(6) An order giving permission to enforce the award shall —

(a) be drawn up by the applicant; and

(b) be served on the respondent by —

(i) delivering a copy to him personally; or

(ii) sending a copy to him at his usual or last known place of residence or business.

(7) Within fourteen days after service of the order giving permission to enforce the award or, if the order is to be served out of the jurisdiction, within such other period as the Court may set —

(a) the respondent may apply to set aside such order; and

(b) the award shall not be enforced until —

(i) after the expiration of that period; or

(ii) if the respondent applies within that period to set aside, until after the application made by the respondent has been finally disposed of.

(8) The order giving permission for enforcement shall contain a statement of the right to make an application to set aside the order.

(8A) Order 11, rules 5, 6, and 8 shall apply to the service out of jurisdiction of the arbitration claim originating summons, or any order made in such claim, under paragraph (5).

(9) Where a body corporate is a party, any reference in this rule to a place of residence or business shall have effect as if the reference were to the registered or principal address of the body corporate.

(10) Where the award sought to be enforced is in the nature of an interim injunction under subsection 13(6) of the 1952 Act or subsection 19(1) of the 2005 Act, the order shall be granted only if the applicant undertakes to abide by any order the Court or the arbitral tribunal may make as to damages. The order shall be enforceable immediately, and subparagraph (7)(b) shall not apply.

9 Registration in High Court of foreign awards (O 69 r 9)

Where an award has, under the law in force in the place where it was made become

enforceable in the same manner as a judgment given by a Court in that place, an applicant may enforce the award in the manner provided for under rule 8.

[65] Section 8 of our Arbitration Act provides that 'No court shall intervene in matters governed by this Act, except where so provided in this Act'. The setting aside provision in O 69 r 8(7) of the Rules of Court 2012 must therefore be interpreted so as to be consistent with ss 38 and 39 of the Act.

[66] Sections 38 and 39 of our Arbitration Act, read with O 69 rr 8 and 9 of the Rules of Court 2012, provide for a two-stage process:

The *first stage* is essentially an ex parte proceeding — but subject to the power of the court as stipulated in para (4) of O 69 r 8 to require service of the arbitration claim originating summons on a party to the arbitration. An ex parte order giving permission to enforce an arbitral award is made at this stage.

The *second stage* is an inter partes proceeding during which the court deals with the application to set aside an ex parte order giving leave to enforce an arbitral award. The application must be made within the prescribed time after that order is served on the party against whom the order is made.

Case law

[67] The plaintiff relied heavily on *Dardana* and as mentioned above, submitted that once the formal requirements of the production of the arbitral award and arbitration agreement in writing have been complied with at the first stage, leave to enforce the award must be granted and the matter then moves to the second stage.

[68] The defendant submitted that we ought not to follow the approach in *Dardana* as, according to the defendant in its written submissions, *Dardana* is not applicable to Malaysia 'because it applied the UK definition of arbitration agreement which did not require the arbitration agreement to be actually in writing, as opposed to the Malaysian law, Australian law and the New York Convention'. According to the defendant, the Court of Appeal in Victoria in *Altain* had declined to follow the approach in *Dardana* due to the difference in the definition.

[69] In *Dardana*, in discussing the scheme of the UK Act in relation to enforcement of arbitral awards, Mance LJ said:

> [10] I consider that the scheme of the 1996 Act is reasonably clear. A successful party to a New York Convention award, as defined in s 100(1) has a prima facie right to recognition and enforcement. At the first stage, a party seeking recognition or enforcement must, under s 102(1), produce the duly authenticated award or duly certified copy and the original arbitration agreement or a duly certified copy. *The*

A *arbitration agreement means an arbitration agreement in writing, as defined in s 5.* Once such documents have been produced, recognition or enforcement may be refused at the second stage only if the other party proves that the situation falls within one of the heads set out in s 103(2). The issue before us concerns the content of and relationship between the first and second stages. The first stage must involve
B the production of an award which has actually been made by arbitrators. ... However, it must be irrelevant at that stage that the award is as a matter of law invalid, on any of the grounds set out in s 103(2), since otherwise there would have been no point in including s 103(2). The award so produced must also have been made by arbitrators purporting to act under whatever is the document which is at
C the same time produced as the arbitration agreement in writing. That, it seems to me, is probably sufficient to satisfy the requirement deriving from the combination of s 100(1) and s 102(1) to produce 'an award made, in pursuance of an arbitration agreement'. The words 'in pursuance of an arbitration agreement' could in other contexts require the actual existence of an arbitration agreement. But they could
D also mean 'purporting to be made under'. Construed in the latter sense the overlap and inconsistency to which I have referred are avoided. Any challenge to the existence or validity of any arbitration agreement on the terms of the document which the arbitrators have acted falls to be pursued simply and solely under s 103(2)(b).

E [12] ... *at the first stage, all that is required by way of an arbitration agreement is apparently valid documentation, containing an arbitration clause, by reference to which the arbitrators have accepted that the parties had agreed on arbitration or in which the arbitrators have accepted that an agreement to arbitrate was recorded with the parties' authority.* On that basis, it is at the second stage, under s 103(2), that the other party has to prove that no such agreement was ever made or validly made. (Emphasis
F added.)

[70] We believe it is useful at this stage to set out the relevant portions of ss 102 and 103 of the UK Act, as well as those of ss 5 and 6 of that Act which
G define the terms 'arbitration agreement' and 'agreement in writing':

5 Agreements to be in writing

(1) ...

(2) There is an agreement in writing —

H (a) if the agreement is made in writing (whether or not it is signed by the parties),

(b) if the agreement is made by exchange of communications in writing, or

I (c) if the agreement is evidenced in writing.

(3) Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing,

(4) An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement.

(5) An exchange of written submissions in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged.

(6) References in this Part to anything being written or in writing include its being recorded by any means.

6 Definition of arbitration agreement.

(1) In this Part an 'arbitration agreement' means an agreement to submit to arbitration present or future disputes (whether they are contractual or not).

(2) The reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement.

102 Evidence to be produced by party seeking recognition or enforcement.

(1) A party seeking the recognition or enforcement of a New York Convention award must produce —

(a) the duly authenticated original award or a duly certified copy of it, and

(b) the original arbitration agreement or a duly certified copy of it.

(c)

(2) ...

103 Refusal of recognition or enforcement.

(1) Recognition or enforcement of a New York Convention award shall not be refused except in the following cases.

(2) Recognition or enforcement of the award may be refused if the person against whom it is invoked proves —

(a) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity;

(b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made;

(c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;

A (d) that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration (but see subsection (4));

B (e) that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country in which the arbitration took place;

C (f) that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.

(3) Recognition or enforcement of the award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the

D award,

[71] Lord Justice Tomlinson, in delivering his judgment in the Court of Appeal in *Lombard-Knight*, quoted the same para 10 of Mance LJ's judgment in *Dardana* that we have quoted above and reiterated that the 'first stage is

E concerned only with the appearance of there being a valid award based upon a compliant arbitration agreement'.

[72] Similar approach as in *Dardana* was taken by the court in the Singapore

F cases of *Aloe Vera* and *Ultrapolis 300*.

[73] In *Dallah*, Dallah Real Estate and Tourism Holding Co ('Dallah Co') had obtained a final arbitral award under the auspices of the International Chamber of Commerce in Paris against the Ministry of Religious Affairs of

G Pakistan. Dallah Co obtained leave before a judge of the High Court to enforce the award. The order was subsequently set aside on the Ministry's application on the basis that the agreement was not a valid agreement as between the Ministry and Dallah Co under the law of the country where the award was made. The decision to set aside the order for leave to enforce the award was

H upheld by the Court of Appeal. Dallah Co appealed to the Supreme Court.

[74] The issue for determination in *Dallah* was not in relation to the first stage of an application for enforcement. However, Lord Mance JSC indicated what that stage entails. He said:

I

> ... The scheme of the New York Convention, reflected in sections 101–103 of the 1996 Act may give limited prima facie credit to apparently valid arbitration awards based on apparently valid and applicable arbitration agreements, by throwing on the person resisting enforcement the onus of proving one of the matters set out in article V(I) and section 103. But that is as far as it goes in law ...

[75] In the earlier part of his judgment Lord Mance said that 'Dallah could not satisfy even the conditions of article IV(1) of the Convention and s 102(1)(b) of the 1996 Act requiring the production of an agreement under which the parties agreed to submit the question of arbitrability to the tribunal'. A close reading of the facts of the case indicate that there *was* an arbitration agreement tendered at the ex parte stage, but it was an agreement between Dallah Co and the Awami Hajj Trust established by the government of Pakistan whose secretary was to be the secretary of the Ministry of Religious Affairs.

[76] In the *Astro* case, Sundaresh Menon CJ, delivering the judgment of the Singapore Court of Appeal, having referred to both *Altain* and *Dardana,* gave the following view:

> ... The distinction between Stage One and Stage Two matter is an issue that goes towards burden of proof of entitlement to enforcement. No doubt in certain cases the burden of proof may prove determinative, for example, where the award creditor cannot even produce an arbitration agreement. However it is equally true that in very many cases, the award creditor can produce an arbitration agreement. Even if the arbitration agreement is challenged as not having been entered into between the parties, such a challenge would, save in the clearest of cases, almost certainly proceed to Stage Two where the onus is then on the award debtor to make good its assertion that the presented arbitration agreement was in fact never agreed to or formed between the parties.

[77] In *Altain* the dispute was in relation to an operations management agreement ('the OMA') executed between Altain Khuder LLC ('Altain Khuder') and IMC Mining ('IMCM'). IMC Aviation Solutions ('IMCS') shared the same address as IMCM. The OMA contained an arbitration agreement. Altain Khuder terminated the OMA by a memorandum addressed to IMCM. Altain Khuder commenced arbitration proceedings against IMCM. The arbitral award only named Altain Khuder and IMCM as parties to the award. However, the text of the award made several references to IMCS in relation to the supply of project cost details.

[78] Altain Khuder then applied to enforce the arbitral award against IMCM as well as IMCS. At the ex parte stage, an enforcement order was granted. IMCS applied to set aside the enforcement order but was unsuccessful. IMCS then appealed against the ex parte enforcement order as well as the dismissal of its application to set aside that order.

[79] Hansen JA and Kyron AJA in their judgment gave the following opinion with regard to the first stage of an application to enforce an arbitral award:

> [134] As the party invoking the court's jurisdiction, the award creditor has an evidential onus of satisfying the court, on a prima facie basis, that it has jurisdiction

to make an order enforcing a foreign arbitral award. Section 9 of the Act assists the award creditor to discharge the evidential onus …

[135] In our opinion, at stage one, the award creditor must satisfy the court, on a prima facie basis, of the following matters before the court may make an order enforcing the award:

(a) an award has been made by a foreign arbitral tribunal granting relief to the award creditor against the award debtor;

(b) the award was made pursuant to an arbitration agreement;

(c) The award creditor and the award debtor are parties to the arbitration agreement.

[136] The above analysis is supported by *Dallah*, in which Lord Mance JSC said that the scheme of the convention gives 'limited prima facie credit to apparently valid arbitration awards based on apparently valid and applicable arbitration agreements'.

[137] *Where an award expressly states that it has been made in favour of the award creditor against the award debtor pursuant to an arbitration agreement and that agreement names the award creditor and the award debtor as parties, upon production of the arbitration agreement and the award in accordance with s 9(1), the award creditor would, by virtue of s 9(5), establish its prima facie entitlement to an order enforcing the award.* It should be borne in mind that, by virtue of s 3(4) of the Act, the expression 'arbitration agreement' has a wide meaning.

[138] Compliance with section 9(1) of the Act will not always provide sufficient prima facie evidence to satisfy the court that leave should be granted for the enforcement of a foreign arbitral award. This will be so, in particular, where, on the face of the arbitration agreement and the award, the person against whom the award was made was not a party to the arbitration agreement. If the arbitration agreement and the award are the only evidence presented to the court, that evidence would be insufficient to invoke the court's jurisdiction under s 8(1) and (2) to enforce a foreign arbitral award 'on the parties to an arbitration agreement in pursuance of which it was made'.

[139] The above discussion may be illustrated by an example. *If the named parties to an arbitration agreement were X and Y, and an award was made in favour of X against Z, production of the arbitration agreement and the award would not suffice for the making of an ex parte order for the enforcement of the award even if the award stated that it was made pursuant to the arbitration agreement.* This is because, even though the award purported to have been made under the arbitration agreement, the contents of those documents do not provide any evidence that Z was a party to the arbitration agreement.

[140] Where the contents of the arbitration agreement and the award do not provide prima facie evidence of the matters set out at [135] above, *the court, rather than proceeding ex parte, should require the award creditor to give notice of the proceeding to the award debtor and the proceeding should proceed on an inter partes basis …*

[141] … At stage one, the court must carefully review the award and the arbitration agreement that are filed pursuant to s 9(1) of the Act and determine whether those

documents, whether considered alone or in combination with other evidence, satisfy the prima facie evidential requirements set out at [135] above. (Emphasis added.)

[80] We reproduce below the relevant portions of s 9 of the Australia Act referred to in *Altain:*

9 Evidence of awards and arbitration agreements

(1) In any proceedings in which a person seeks the enforcement of a foreign award by virtue of this Part, he or she shall produce to the court:

(a) the duly authenticated original award or a duly certified copy; and

(b) the original arbitration agreement under which the award purports to have been made or a duly certified copy.

(2) ...

(3) ...

(4) ...

(5) A document produced to a court in accordance with this section is, *upon mere production,* receivable by the court as prima facie evidence of the matters to which it relates. (Emphasis added.)

[81] The term 'arbitration agreement' is defined in sub-s 3(1) of the Australia Act as 'an agreement in writing of the kind referred to in subarticle 1 of Article II of the Convention'. The term 'agreement in writing' is defined in that subsection as having the same meaning as in the convention.

[82] Subarticle 1 of article II of the convention defines an agreement which must be recognised by a contracting state as 'an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject-matter capable of settlement by arbitration'.

[83] Subarticle 2 of article II of the convention defines the term 'agreement in writing' as follows:

2. The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams

[84] However, the Australia Act further explains the terms 'agreement in writing' and 'arbitration agreement', respectively, in sub-ss 3(4) and (5) of that Act as follows:

A (4) For the avoidance of doubt and without limiting subsection (1), an agreement is in writing if:

(a) its content is recorded in any form whether or not the agreement or the contract to which it relates has been concluded orally, by conduct, or by other means; or

B

(b) it is contained in an electronic communication and the information in that communication is accessible so as to be usable for subsequent reference; or

C (c) it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

(5) For the avoidance of doubt and without limiting subsection (1), a reference in a contract to any document containing an arbitration clause is an arbitration agreement, provided that the reference is such as to make the clause part of the

D contract.

[85] There is, in our view, no substantial difference between the definition of 'agreement in writing' in s 5 of the UK Act and s 3 of the Australia Act. We note

E that the definition in the convention as adopted in sub-s 3(1) of the Australia Act uses the term 'includes', indicating that it is not exhaustive. We note also the care taken in the drafting of sub-s 3(4) of that Act (by the use of the words 'without limiting subsection (1)') not to limit the wide definition given in the convention. The discussion in *Dardana* on the definition of agreement in

F writing arose, to our minds, from the difficulty in rationalising the definition of that term in s 5 and the requirement in s 102 of the UK Act that the original arbitration agreement or its copy be produced.

[86] Our Arbitration Act, however, is more restrictive as can be seen from

G sub-s 9(4) set out above. An arbitration agreement must be in a document signed by both parties, or recorded in an exchange of communication, or contained in an exchange of a statement of claim or defence where the existence of an arbitration agreement between the parties is not denied.

H

[87] In our view, the discussion on the differences in the definitions of 'agreement in writing' in the various jurisdictions does not detract from the common position taken by all the cases we have referred to above that all that the court is required to do at the first stage of the enforcement proceeding is to

I satisfy itself that the party seeking enforcement has produced before the court:

(1) the arbitral award sought to be enforced, which prima facie or apparently is a valid award; and

(2) the arbitration agreement, which is prima facie or apparently a valid agreement, between the party seeking to enforce the award and the party against whom the award is sought to be enforced, and pursuant to which the award was made.

[88] If the parties are named in the arbitration agreement, or if it is obvious on the face of the arbitration agreement that they are parties to the agreement, obviously the 'apparently valid' test in *Dardana*, *Lombard-Knight* and *Dallah*, or the 'prima facie' test in *Altain*, is satisfied. There is nothing more to be done. The award creditor applying for enforcement has discharged its evidential burden. Leave must be granted, and the matter must proceed to the second stage if the award debtor seeks to challenge such leave.

[89] The difficulty arises when the parties are not named in the agreement or it is not obvious from the agreement that the parties are parties to the agreement. In such circumstances, can it be said that the evidential burden on the award creditor seeking enforcement has been discharged?

[90] To our minds, Lord Mance's judgments in *Dardana* and in *Dallah* do not exclude the possibility of the court refusing leave when the evidential burden on the award creditor is not discharged.

[91] The inter partes hearing recommended by Hansen JA and Kyron AJA in para 140 of *Altain* in fact, in our opinion, helps the party seeking enforcement. That party gets a 'second chance', in a manner of speaking, to produce additional evidence *at the first stage* that would show, notwithstanding the lack of obvious reference in the arbitration agreement itself to that party or the party against whom enforcement is sought, that there is in existence an arbitration agreement between the parties.

[92] However, once an order is made granting leave to enforce an arbitral award, the case authorities cited before us, including *Altain*, show that the order can *only be set aside in the second (substantive) stage* based on the exhaustive grounds available at that second stage. This, in our view, is consistent with the provisions of the Model Law and, in the context of our jurisdiction, with ss 38 and 39 of our Arbitration Act.

[93] It is worth noting that in *Altain*, the application by IMCS to set aside the leave or ex parte order was made at the second (substantive) stage, and leave to appeal to the Court of Appeal was given against the substantive decision. Similarly, in *Dardana*, *Lombard-Knight* and *Dallah*, the applications to set aside the order giving leave to enforce the arbitral award were made at the second stage and were made based on the grounds in s 103 of the UK Act. In *Dardana,* however, the appellant in the Court of Appeal argued that it was still

open to them at the second stage to resist enforcement under ss 100 and 102 of the UK Act and that the burden was therefore still on the respondent to show the existence of a valid agreement. This argument was not accepted by the court.

This appeal

[94] In the appeal before us, it was not in dispute that at the first stage in the High Court annexures 6 and 7 signed by the defendant were not produced. The STA itself was produced, and there was no dispute that it contained an arbitration agreement and was signed by the purchasers (including the plaintiff) as well as the vendor.

[95] The learned judge referred to the judgment of the Federal Court in the case of *Ajwa for Food Industries Co (MIGOP), Egypt v Pacific Inter-Link Sdn Bhd* [2013] 5 MLJ 625 on the approach to be taken in determining the existence of an arbitration agreement. The statement quoted by the learned judge in his judgment appears in the following paragraph in the Federal Court's judgment (the quoted statement is set out in bold):

> [26] Section 9(5) of the Act therefore clarifies that the applicable contract law remains available to determine the level of consent necessary for a party to become bound by an arbitration made 'by reference'. Section 9(5) of the Act in our view addresses the situation where the parties, instead of including an arbitration clause in their agreement, include a reference to a document containing an arbitration agreement or clause. It also confirms that an arbitration agreement may be formed in that manner provided, firstly, that the agreement in which the reference is found meets the writing requirement and secondly, that the reference is such as to make that clause part of the agreement. The document referred to need not to be signed by the parties to the contract (see the case of *Astel-Peiniger Joint Venture v Amos Engineering & Heavy Industries Co Ltd* [1994] 3 HKC 328). **We are of the view that the mere fact the arbitration clause is not referred to in the contract and that there is a mere reference to standard conditions which was neither accepted nor signed, is not sufficient to exclude the existence of the valid arbitration clause. There is no requirement that the arbitration agreement contained in the document must be explicitly referred to in the reference. The reference need only be to the document and no explicit reference to the arbitration clause contained therein is required.**

[96] The learned judge examined the STA and found that the definition of 'Appendices' in cl 1.1 as well as the provisions of cl 1.2 of the STA were sufficient to show that there was, prima facie, an arbitration agreement between the parties. The definition of 'Appendices' in cl 1.1 of the STA is as follows:

> Appendices
>
> Means the numbered documents, the copies or originals of which have been duly

initialed by the parties and annexed to this Share Sale Agreement and which constitute an integral part thereof. A

[97] Clause 1.2 of the STA is set out below:

CONTRACTUAL DOCUMENTS B

The Preamble and the Appendices shall bind the Parties in the same manner as this agreement, of which they constitute and [sic] integral part.

However, in the event of a conflict between the provisions of this Agreement proper and its Appendices, the provisions of this Agreement shall take precedence.

In the event of a conflict between the Appendices themselves, their order of precedence shall be determined by their numbering. C

[98] We note that while the parties expressed to be the parties to the STA are the vendor and the purchaser, it was never in dispute that the defendant signed annexures 6 and 7. It is clear from cll 1.1 and 1.2 of the STA that the annexures constitute an integral part of the STA. There was no argument before us or the courts below that there was any conflict between the annexures and the STA itself. D

E

[99] It is obvious from a reading of cl 3.3.1 of the STA that the purchasers had agreed to extend a loan of USD5m to the defendant. the purpose of that loan to the defendant and the defendant's obligation to repay the loan are clearly set out in cl 7.1. The mechanism for the repayment of that loan is provided for in cll 3.3.1 and 3.3.2 of the STA. It is also obvious from cl 3.3.1.1 of the STA that the undertaking in annexure 6 (stated in that clause to have been made on the date of signature of the STA itself) is in relation to that loan. So is the deed of pledge in annexure 7 which is referred to in cl 3.3.1.2. F

G

[100] Given that the existence and terms of annexures 6 and 7 were not disputed in the courts below and not disputed before us (the only objection being taken is on their non-production at the first stage), and given the provisions in cll 3.3.1 and 7.1 of the STA referred to above, we are of the considered view that by producing the STA at the ex parte stage before the High Court the plaintiff had discharged the burden imposed upon it by sub-s 38(2) of our Arbitration Act. H

[101] The learned judge was thus not in error when he granted the 16 July 2013 order. I

[102] Quite obviously the learned judge was satisfied that there was no necessity to resort to O 69 r 8(4) of the Rules of Court 2012 to require the originating summons to be served on the defendant. Such requirement would

be consistent with the recommendation in *Altain* of an inter partes hearing at the first stage.

[103] At this juncture we must mention the fact that before us counsel for the defendant submitted that 'I am ready to assume that the annexures were produced together. The Court of Appeal considered them together and said that the respondent was not a party'. This appears to be a concession that at the hearing of the setting aside application (the second stage) annexures 6 and 7 were produced before the High Court by the plaintiff.

[104] Having been satisfied that the requirements of the first stage of the enforcement proceedings had been complied with, and having made the 16 July 2013 order granting permission to the plaintiff to enforce the arbitral award, the matter must now move to the next stage.

[105] In our view, the two-stage process for the enforcement of arbitral awards as contained in ss 38 and 39 of our Arbitration Act (read with O 69 r 8 of the Rules of Court 2012) does not permit a party seeking to set aside an order made under s 38 to apply to set it aside under that very section on the ground that there was no arbitration agreement in existence between the parties. That party must apply to set that order aside under s 39.

[106] When the matter moves to the second stage under s 39, the defendant can only apply to set aside the order made under s 38 upon any one or more of the grounds set out in s 39 and no other.

[107] In the case on appeal before us, the defendant's setting aside application was not made on any of the substantive grounds in s 39. It was made under s 38 solely on the ground that the STA produced by the plaintiff was not an arbitration agreement between the plaintiff and the defendant and therefore the threshold requirement in para 38(2)(b) had not been satisfied.

[108] The learned judge was therefore correct in dismissing the defendant's application to set aside the 16 July 2013 order.

Conclusion

[109] For the reasons set out above, our answer to leave question (ii) is in the negative.

[110] In the light of the actual issues determined by the Court of Appeal and our discussion above, we find no necessity to answer leave question (i).

DECISION

[111] We therefore allow this appeal with costs. We set aside the order of the Court of Appeal and reinstate the order of the High Court.

Appeal allowed with costs.

Reported by Kohila Nesan